No. 47

# In the Supreme Court of the United States

October Term, 1959

ERNEST DOSSY YANCY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The order of the District Court and the supporting findings of fact and conclusions of law, entered on March 29, 1957 (R. 18), are not reported. The opinion of the Court of Appeals (R. 21-23) is reported at 252 F. 2d 554.

### JURISDICTION

The judgment of the Court of Appeals was entered on February 28, 1958 (R. 24). On May 26, 1958, Mr. Justice Burton entered an order extending the

time for filing a petition for a writ of certiorari to and including June 27, 1958 (R. 26). The petition was filed on June 25, 1958, and was granted on March 23, 1959 (R. 27). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether consecutive sentences could properly be imposed on two counts charging, respectively, a purchase and a sale of the same quantity of narcotics on the same day, both in violation of the stamped package requirement of the Internal Revenue Code.

## STATUTE INVOLVED

Section 2553(a) of the Internal Revenue Code of 1939, as amended (26 U.S.C., (1952 ed., Supp. I), 2553(a)):

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; * * *.[1]

## STATEMENT

Petitioner was tried and convicted in the District Court for the Eastern District of Michigan on two counts of an information charging violations of Sec-

[1] Now Section 4704(a) of the Internal Revenue Code of 1954, 26 U.S.C.

tion 2553(a) of the Internal Revenue Code of 1939, *supra*, p. 2. One count charged him with the purchase of a specified quantity of heroin on May 17, 1954, "not in or from the original stamped package," and the other charged him with selling, dispensing and distributing the same quantity on the same date to a special employee of the United States Bureau of Narcotics, likewise "not in or from the original stamped package."[2] He was sentenced on September 2, 1954, to five years' imprisonment on each count, the sentences to run consecutively (R. 5-6).

In November 1956, petitioner filed a motion under 28 U.S.C. 2255 to vacate or correct his sentence, con-

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[2] The full text of the counts is as follows (R. 1-2):

"Count Three:

"The United States Attorney further charges that on or about May 17, 1954, in the Eastern District of Michigan, Southern Division, Ernest Dossy Yancy unlawfully and knowingly purchased a quantity or narcotics, to-wit: approximately seven hundred seventy-five (775) grains of heroin, not in or from the original stamped package and not having on it the appropriate tax-paid United States Internal Revenue stamps, as required by law; in violation of Section 2553(a), Title 26, U.S.C.

"Count Four:

"The United States Attorney further charges that on or about May 17, 1954, in the Eastern District of Michigan, Southern Division, Ernest Dossy Yancy did unlawfully and knowingly sell, dispense and distribute to a special employee of the U. S. Bureau of Narcotics approximately seven-hundred seventy-five (775) grains of heroin, which said heroin was sold, dispensed and distributed not in or from the original stamped package and not having on it the appropriate tax-paid United States Internal Revenue stamps, as required by law; in violation of Section 2553(a), Title 26 U.S.C."

tending, *inter alia*, that the consecutive sentences amounted to double punishment in that the evidence at his trial showed only that he sold the heroin and the conviction for purchasing was based only on his possession of the narcotics (R. 7-13). The trial court concluded that each offense required proof of a fact not demanded by the other and that "the two counts did not charge offenses growing out of a single continuous transaction," citing (among other cases) *Blockburger* v. *United States*, 284 U.S. 299, and *Albrecht* v. *United States*, 273 U.S. 1 (R. 16). The Court of Appeals affirmed, relying upon the *Blockburger* rule and leaving to this Court the question whether the *Blockburger* line of authority should be re-examined (R. 22-23).[3]

## SUMMARY OF ARGUMENT

### I

The petition in this case, filed prior to the decision in *Gore* v. *United States*, 357 U.S. 386, attacked *Blockburger* v. *United States*, 284 U.S. 299, as inconsistent with later decisions such as *Bell* v. *United States*, 349 U.S. 81. *Gore* specifically reaffirmed *Blockburger* in upholding consecutive sentences for three offenses arising out of a single sale of narcotics. Petitioner's continued invocation of the principle of

[3] The further contentions, also rejected by the courts below, that the prosecution by information rather than indictment was invalid and that the District Court should have held a hearing on the motion under 28 U.S.C. 2255 are not renewed here (see Pet. 4).

lenity of *Bell* and *Prince* v. *United States*, 352 U.S. 322, on the basis of the Boggs Act of 1951 (which prescribed a maximum penalty of five years' imprisonment for first offenders against the narcotics laws) is unavailing, for the implications of the Boggs Act and other amendments increasing penalties and prescribing heavier penalties for second and third offenders were considered in *Gore* and the Court held that there is no room for judicial lenity in the area of narcotics offenses. This holding was reiterated in *Harris* v. *United States*, 359 U.S. 19, where the Court, on the authority of *Gore*, upheld consecutive sentences for purchasing unstamped narcotics and receiving and concealing the same drug with knowledge that it had been unlawfully imported, even though the prosecution proved only that the defendant had been in possession of the drug and relied upon the statutory presumptions arising from such possession to establish the elements of both offenses.

Petitioner's further contention that the consecutive sentences imposed upon him constituted double jeopardy was also specifically overruled in the *Gore* case.

## II

The consecutive sentences involved in the *Gore* and *Harris* cases were based upon the single acts of sale and possession, respectively. The consecutive sentences imposed upon petitioner were based upon the separate transactions of a purchase and a sale of unstamped narcotics, each of which required its own separate impulse, enterprise and participants, and each of which is specifically prohibited by the statute

involved here. The separate transactions of purchase and sale are not converted into a single transaction merely because the purchase may have been made with resale in mind, for Congress may properly, as in this statute, punish each step in an offender's unlawful activities. It follows, therefore, that the Court's rejection of the contentions advanced in the *Gore* and *Harris* cases is even more strongly called for in this case.

## III

Petitioner's contention that the decision below is inconsistent with *Blockburger* because it allowed separate offenses to be proved and separate punishments to be imposed upon proof of the single fact of *possession* of unstamped narcotics is wrong both in fact and in law.

1. Petitioner is in an even less favorable position on the facts than was the defendant in *Harris*, where only possession was proved and the statutory presumptions arising from that fact were invoked as to both counts. Here, the *sale* was proved by direct evidence; the presumption (which in the circumstances of a case such as this is rooted in the strongest of probabilities) was invoked only to support the charge of a prior purchase.

2. The *Harris* decision is dispositive of petitioner's contention as a matter of law. The Court made it clear in that case that the "ultimate facts of the violation" (359 U.S. at 23)—the elements of the offense as defined by Congress—are decisive in the application of the test of identity of offenses arising out of a single act or transaction. The nature or kind of

the particular proof which will suffice to establish a violation of a specific statutory prohibition, whether it be direct or prima facie, is not determinative. If the distinct offenses involved in *Harris* were not transformed into a single offense merely because the prosecution relied upon the statutory presumptions arising from possession to establish the ultimate facts of both violations, *a fortiori* the distinct offenses in this case of purchase and of sale were not merged when the prosecution proved petitioner's possession and sale by direct evidence and invoked the presumption only to establish that he had also previously purchased the narcotics.

## ARGUMENT

### I.

**Petitioner's Contentions That the Principle of Lenity of *Bell* v. *United States*, 349 U.S. 81, Has Undermined the Authority of *Blockburger* v. *United States*, 284 U.S. 299, and That the Consecutive Sentences Imposed Upon Him Constituted Double Jeopardy Were Overruled By the Recent Decisions in *Gore* v. *United States*, 357 U.S. 386, and *Harris* v. *United States*, 359 U.S. 19.**

1. The petition in this case was filed prior to the June 30, 1958, decision of this Court in *Gore* v. *United States*, 357 U.S. 386. The main thrust of petitioner's argument (Pet. 5-7) was the same as that subsequently rejected by the Court in that case, *i.e.*, that *Blockburger* v. *United States*, 284 U.S. 299, is in conflict with later decisions such as *Bell* v. *United States*, 349 U.S. 81, and should be overruled. *Gore*

specifically reaffirmed *Blockburger* in upholding consecutive sentences for three offenses arising out of a single sale of narcotics,[1] stating:

> * * * We brought the case here, 355 U.S. 903, in order to consider whether some of our more recent decisions, while not questioning *Blockburger* but moving in related areas, may not have impaired its authority.
>
> We adhere to the decision in *Blockburger* v. *United States*, *supra*. The considerations advanced in support of the vigorous attack against it have left its justification undisturbed, nor have our later decisions generated counter currents. [357 U.S. at 388].
>
> * * * *
>
> * * * The fact that an offender violates by a single transaction several regulatory controls devised by Congress as means for dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic. * * * [357 U.S. at 389].

Although petitioner now attempts incorrectly to distinguish *Blockburger* and *Gore* from the instant

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[1] "(1) Sale of the drug not pursuant to the requisite order form of the purchaser, in violation of Section 4705(a) of the Internal Revenue Code of 1954; (2) sale of the drug not in or from the original stamped package, in violation of Section 4704(a) (formerly Section 2553(a) of the Internal Revenue Code of 1939, the section involved in the instant case); and (3) concealment and sale of the drug with knowledge that it had been unlawfully imported, in violation of Section 2(c) of the Narcotic Drugs Import and Export Act, 21 U.S.C. 174 (357 U.S. at 387-388).

case,[5] he also continues to invoke the principle of lenity of *Bell* v. *United States*, *supra*, and *Prince* v. *United States*, 352 U.S. 322, and attempts to establish a basis for applying that doctrine in the provision of the Boggs Act of 1951 (65 Stat. 767; now incorporated in part in Section 7237(a) of the Internal Revenue Code of 1954) prescribing a maximum penalty of five years' imprisonment for first offenders against the narcotics laws (Br. 9-11). This contention presents nothing new. The implications of the Boggs Act and other amendments of the narcotics laws (which increased penalties and prescribed heavier penalties for second and third offenders) as reflecting a Congressional purpose to ameliorate the *Blockburger* doctrine, and the impact of the principle of lenity in the light of such legislation, were fully argued in the *Gore* case (No. 668, Oct. Term 1957, Pet. Br. 33-35, 45-49; Br. for U.S., 27-37, 44-45). The Court authoritatively held that there was no room for judicial lenity in the area of narcotics offenses (357 U.S. at 391-392):

> * * * We held [in *Bell*] that the transportation of more than one woman as a single transaction is to be dealt with as a single offense, for the reason that when Congress has not ex-

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[5] Petitioner is mistaken in his suggestion (Br. 7, 8) that the sentences in controversy in *Blockburger* and *Gore* were based upon two sales on different dates. Although in each of those cases there were two such sales, which in themselves were separate offenses (*Blockburger*, 284 U.S. at 301-303), the cumulative sentences in question were imposed for the separate offenses arising out of a single act of sale (*id.*, at 301, 303-304; *Gore*, 357 U.S. at 387-388).

plicitly stated what the unit of offense is, the doubt will be judicially resolved in favor of lenity. It is one thing for a single transaction to include several units relating to proscribed conduct under a single provision of a statute. It is a wholly different thing to evolve a rule of lenity for three violations of three separate offenses created by Congress at three different times, all to the end of dealing more and more strictly with, and seeking to throttle more and more by different legal devices, the traffic in narcotics. Both in the unfolding of the substantive provisions of law and in the scale of punishments, Congress has manifested an attitude not of lenity, but of severity toward violation of the narcotics laws. Nor need we be detained by two other cases relied on, *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, and *Prince* v. *United States*, 352 U.S. 322. In the former we construed the record-keeping provisions of the Fair Labor Standards Act as punishing "a course of conduct." Of the *Prince* case, it suffices to say that the Court was dealing there "with a unique statute of limited purpose." 352 U.S., at 325.[6]

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[6] Although the Court did not specifically recite the Boggs Act and other amendments discussed in the briefs, in its review of the statutes involved in that case, the allusion in the above quotation to "the scale of punishments" obviously had reference to such amendatory legislation. The fact that the Court considered the latter statutes is further emphasized by the references in the Chief Justice's dissent to "the origins of the three statutes involved, the text and background of recent amendments to these statutes, the scale of punishments prescribed for second and third offenders, and the evident legislative purpose to achieve uniformity in sentences" as supporting his view that "the present purpose

This holding was reiterated in *Harris* v. *United States*, 359 U.S. 19, decided March 2, 1959, which involved consecutive sentences for (1) purchasing narcotics not in or from the original stamped package and (2) receiving and concealing the same drug knowing it to have been unlawfully imported. Notwithstanding that the government proved only that the defendant had been in possession of the drug and relied upon the statutory presumptions arising from such possession to establish the elements of both offenses (359 U.S. at 20), the Court held that the case was controlled by *Gore*.

2. Similarly, petitioner's present contention that double jeopardy is involved in his sentences (Br. 11-13) was fully argued (Pet. Br. 53-76; Gov. Br. 38-47, 51-52) and expressly rejected in *Gore*, 357 U.S. at 392-393, over the dissent of Mr. Justice Douglas (Mr. Justice Black concurring), 357 U.S. at 395-397, upon which petitioner relies (Br. 11-12).

Petitioner presents no new considerations or arguments for deciding these questions differently, or for overruling these two recent decisions of the Court on these issues. In these circumstances, we do not believe it appropriate to retrace the ground already

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of these statutes is to make sure that a prosecutor has three avenues by which to prosecute one who traffics in narcotics, and not to authorize three cumulative punishments for the defendant who consummates a single sale." 357 U.S. at 394. Petitioner quotes this paragraph of the Chief Justice's dissent in support of his contention that the consecutive sentences imposed upon him were violative of the intent of Congress (Br. 10).

covered in our briefs and in the opinions of the Court in the *Gore* and *Harris* cases.

## II.

### Petitioner's Offenses Did Not Stem From A Single Transaction Violating Several Statutory Provisions But Consisted of Two Separate Transactions—A Purchase and A Sale—Each of Which Is Prohibited By the Statute.

The rejection of the contentions advanced in *Gore* and *Harris*, *supra*, is dispositive of, and indeed more strongly called for in, petitioner's case, since the sentences involved here were not based upon one single act of sale or possession (as was true in those cases) but upon the two separate transactions of, first, a purchase and, second, a sale. The two transactions, each requiring its own separate impulse, enterprise, and participants, were, as appears on the face of the statute, considered separately and selectively by Congress; the statute involved here (and in *Gore* and *Harris*), relating to transactions not in or from the original stamped package, prohibits purchases as well as sales, while the companion provision (also involved in *Gore*, but not here) prohibiting transactions without order forms (26 U.S.C. 4705 (a)) covers sales, barters, exchanges or gifts, but not purchases. While the possibility of ambiguity as to whether several offenses or a single offense may be intended can arise where words are somewhat synonymous (cf. *Ladner* v. *United States*, 358 U.S. 169, 176-177), that is not possible where, as here, the prohibited acts are as diametrically opposite as purchase and sale.

The two separate acts of purchase and sale are not made a single transaction by the fact that the purchase may have been made with resale in mind, for Congress may properly, as in Section 2553(a) (now Section 4704(a) of the Internal Revenue Code of 1954), penalize each step in an offender's unlawful activities. E.g., *Albrecht* v. *United States*, 273 U.S. 1, 11-12 (possession of liquor and sale thereof); *Carter* v. *McClaughry*, 183 U.S. 365, 395 (conspiring to commit an offense and committing the offense); *United States* v. *Michener*, 331 U.S. 789 (causing a plate for counterfeiting to be made, and possession of that plate).[7] The fact that this section is designed to implement the narcotics tax laws and is not aimed at transactions in narcotics qua transactions (see *Blockburger* v. *United States*, 284 U.S. at 304), does not affect this conclusion. The specific inclusion of both purchases and sales within the coverage of the section plainly shows that Congress thought it important to prohibit all such transactions in unstamped narcotics, in aid of the enforcement of the stamp tax.[8]

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[7] Significantly, the Court said in *Gore* (357 U.S. at 392) that an overruling of *Blockburger* would also involve overruling the *Albrecht*, *Carter*, and *Michener* cases, among others.

[8] In the course of the argument of the *Gore* case before this Court, in response to a question from the bench as to the limits of the number of offenses punishable under any one of the three sections involved in that case, government counsel replied generally that there would be only one offense under one section. This reply was, of course, meant to relate to the issue in that case as to the number of offenses involved in a single act of sale. Thus, for example,

## III.

### The Separate Offenses of Purchase and Sale Were Not Merged Into A Single Offense Merely Because, In Proving the Purchase, the Prosecution Was Aided By the Statutory Presumption Arising From the Proved Facts of Possession and Sale.

Paraphrasing Mr. Justice Brennan's dissent in the *Gore* case (357 U.S. at 397-398), petitioner contends that the decision below "is inconsistent with the principles of the *Blockburger* case" (Br. 7) "that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not" (284 U.S. at 304). Petitioner asserts that the courts below "allowed separate offenses to be proved and separate punishments to be imposed upon the proof of * * * the single fact of *possession* of unstamped narcotics"

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a single sale not in or from the original stamped package would not be punishable separately as a sale, a dispensing, and a distribution, all of which are prohibited by Section 4704(a) of the Internal Revenue Code (formerly § 2553(a)). (Compare Count Four in this case, fn. 2, p. 3, *supra*, which charged as a single offense that petitioner "did * * * sell, dispense and distribute".) Counsel's remark was not intended to imply that separate and distinct acts, such as a purchase and a sale as in this case, each of which is clearly prohibited by the same section, are not separately punishable. The government's brief in *Gore* pointed out (p. 51) that, wholly aside from the question whether a single act of sale is punishable separately under the three statutes there involved, the evidence in the case indicated that Gore also purchased and transported the drug before he sold it and that these factually separate and distinct offenses supported the consecutive sentences imposed.

(emphasis added) and that this fact "was the source of the [statutory] presumption of unlawfulness in both the purchase and sale" (Br. 7-9; compare 357 U.S. at 397-398). His reliance upon *Blockburger* and the dissenting opinion of Mr. Justice Brennan in *Gore* is misplaced because, (1) as he states in the very next sentence of his brief, "the only evidence introduced at the trial was the *sale* alleged in Count Four" (emphasis added),[9] and (2) the opinion in the *Harris* case makes it clear that the statutory elements of the offenses, not the particular evidence which will suffice to establish such elements, are decisive in the application of the *Blockburger* test.

*First.* On the facts, petitioner is in an even less favorable position than that involved in *Harris*, where, upon direct evidence showing only possession of unstamped narcotics, the statutory presumptions were invoked as to both counts. Here, the offense of

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[9] The United States Attorney advises us that the stenographic notes of the trial proceedings have not been transcribed. The investigative report confirms that this was a typical case of a sale of unstamped narcotics to an informer. In this connection, we should point out that the prosecutive technique used here of charging both a purchase and a sale in violation of the stamped package requirements is atypical, as demonstrated by the fact that we have been unable to find any reported case precisely in point. Typically, the method used in such a case is the one involved in *Gore*, *i.e.*, three counts charging violations of the Narcotic Drugs Import and Export Act and the order form and stamped package requirements of the Internal Revenue Code. The United States Attorney for the Eastern District of Michigan, where this case originated, advises us that the latter procedure is now used in his district.

sale of unstamped narcotics was proved by direct evidence; the presumption was invoked only to support the charge that petitioner earlier purchased the narcotics not in or from the stamped package. As applied in this case, the presumption of purchase arising from petitioner's possession of unstamped narcotics is rooted in the strongest of probabilities. Obviously, petitioner acquired in some way the narcotics which it was proved he sold to a special employee of the Bureau of Narcotics as alleged in Count Four. If he in fact acquired the drug by some means other than purchase, or in or from an original stamped package, it was open to him to adduce proof to that effect. See *Harris*, 359 U.S. at 23. It should not now be open to him to contend that his conviction on Count Three of purchasing the drug should be set aside because the government did not prove the purchase by direct evidence.[10] Indeed, although petitioner disclaimed in his petition (p. 7) any attack upon the sufficiency of the evidence to support his conviction on Count Three, his present claim amounts to just that.

*Second.* On the law, the *Harris* decision completely negates petitioner's contention. The Court there stated (359 U.S. at 23-24):

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[10] *Donaldson* v. *United States*, 23 F. 2d 178 (C.A. 8), cited by petitioner (Br. 9) in support of this contention, is not in point. It was decided on the basis that the statutory presumption arising from possession did not extend to prove the *venue* of the alleged purchase, a holding in effect overruled by this Court in *Casey* v. *United States*, 276 U.S. 413, 417-418.

Petitioner insists that each offense here requires proof of only the single fact of possession, which brings it within the rule in *Blockburger, supra.* However, petitioner completely overlooks the fact that the "acts or transactions" prohibited by the respective statutes cannot be equated to possession alone. Let us analyze the offenses. Under the first count of the indictment, the prosecution must prove a purchase of narcotics, other than in or from the original stamped package. In order to establish these ultimate facts, the prosecutor may put on direct evidence of possession of the unstamped heroin and the statutory presumption of § 4704 (a) then has the effect of establishing, prima facie, that there was in fact a purchase and that the purchase was other than in or from the original stamped package. In this case, the heroin itself was introduced in evidence, thus the jury could determine whether or not it was stamped. Similarly, under the second count, the prosecution was obligated to prove three ultimate facts: (1) that the heroin was received and concealed; (2) that it had been imported contrary to law; and (3) that petitioner knew of the unlawful importation. After putting on direct evidence of the possession, the prosecution was aided by the statutory presumption of § 174 that the ultimate facts of the violation—entirely different, it must be noted, from those of the first count—were also present.

Thus, the *violation*, as distinguished from the direct evidence offered to prove that violation, was distinctly different under each of the respective statutes. Instead of limiting his proof to an alibi, petitioner could, by offering evidence

> tending to controvert one presumption or the other as to the ultimate facts, have earned an acquittal on either count and still have been found guilty on the other. * * *. It follows, even if the *Blockburger* test were applicable, that the offenses were separate and that consecutive sentences could be imposed on each count.

As we have shown (*supra*, pp. 12-13), Congress has dealt specifically with transactions in unstamped narcotics and has clearly defined the units of the offenses involved in such transactions as including both purchases and sales. Under the *Harris* decision, the "ultimate facts of the violation"—the elements of the offense as defined by Congress—are decisive in the application of the test of identity of offenses arising out of a single act or transaction. The nature or kind of the particular proof which will suffice to show a violation of a specific statutory prohibition, whether it be direct or prima facie, is not determinative.[11]

If, in *Harris*, the distinctly different offenses of purchasing unstamped narcotics and receiving and concealing the same drug knowing it to have been unlawfully imported were not transformed into a single offense merely because the prosecution proved only that the defendant had the unstamped narcotics in his possession and relied upon the statutory presumptions to establish the ultimate facts of both

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[11] The case of *Ballerini* v. *Aderholt*, 44 F. 2d 352 (C.A. 5), upon which petitioner relies (Br. 12-13), confused the elements of an offense with the manner of proving it, and was specifically disapproved in *Blockburger*, 284 U.S. at 304.

violations, *a fortiori* the distinct offenses here involved of purchase and sale of unstamped narcotics were not merged when the prosecution, after proving the sale by direct evidence (unaided by the presumption), invoked the presumption arising from the fact of petitioner's possession only to establish that he also purchased the drug not in or from the original stamped package.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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